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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

NO. 79-1186

ORVILLE E. DENNIS,
Petitioner

v.

SIDNEY SPARKS and R. L. LYND,
d/b/a SIDNEY SPARKS, TRUSTEE,
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF RESPONDENTS

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Respondents, SIDNEY SPARKS and R. L. LYND, d/b/a SIDNEY SPARKS, TRUSTEE (hereafter SPARKS), reply to the brief of Petitioner, ORVILLE E. DENNIS (hereafter DENNIS) as follows:

OPINIONS BELOW

The District Court's memorandum order is included in the Appendix to the Petition for writ submitted by ORVILLE E. DENNIS in No. 79-1186 at Page A-1. The panel decision of the Court of Appeals is reported in 588 F2d 124, and the en banc decision under review is reported in 604 F2d 976.

JURISDICTION

Jurisdiction under 28 USC, Sec. 1254(1) is not questioned.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article II, Section 4 Removal from office: The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors. (Emphasis added)

Texas Constitution, Article XVI, Section 41, Bribery and acceptance of bribes: Any person who shall, directly or indirectly, offer, give, or promise, any money or thing of value, testimonial, privilege or personal advantage, to any executive or judicial officer or member of the Legislature to influence him in the performance of any of his public or official duties, shall be guilty of bribery, and be punished in such manner as shall be provided by law..... and shall incur the disabilities provided for said offenses, with a forfeiture of the office they may hold, and such other additional punishment as is or shall be provided by law. (Emphasis added)

Texas Constitution, Article V, Section 11, Disqualification of judges; exchange of districts; holding court for other judges: No

judge shall sit in any case wherein he may be interested.....

Texas Constitution, Article V, Section 1a created the Texas Judicial Qualification Commission by amendment adopted November 2, 1965; it was again amended November 3, 1970; and after the Carrillo impeachment, it was again amended on November 8, 1977, adding certain powers to the Supreme Court, including power to bar a removed judge from holding judicial office in the future. Only pertinent provisions of the 1977 amendment follow:

Section 12(2)

> The name of the State Judicial Qualifications Commission is changed to the State Commission on Judicial Conduct.
>
> (6)A. Any Justice or Judge of the Appellate Courts and District and Criminal District Courts may be removed from office for willful or persistent conduct,

which is clearly inconsistent with the proper performance of his said duties or casts public discredit upon the judiciary or administration of justice.

(8) After such investigation as it deems necessary, the Commission may, in its discretion, request the Supreme Court to appoint an active or retired District Judge or Justice of a Court of Civil Appeals, or retired Judge or Justice of the Court of Criminal Appeals or the Supreme Court, as a Master to hear and take evidence in any such matter, and to report thereon to the Commission. The Master shall have all the power of a District Judge in the enforcement of orders pertaining to witnesses, evidence, and procedure. If, after formal hearing, or after considering the record and report of a Master, the Commission finds good cause therefor, it shall issue an order of public censure or it shall recommend to the Supreme Court the removal or retirement, as the case may be, of the person in question holding an office named in Paragraph A of Subsection (6) of this Section and shall thereupon file with the Clerk of the Supreme Court the entire record before the Commission.

(9) The Supreme Court shall review the record of the proceed-

> ings on the law and facts and in its discretion may, for good cause shown, permit the introduction of additional evidence and shall order public censure, retirement or removal, as it finds just and proper, or wholly reject the recommendation. Upon an order for involuntary retirement for disability or an order for removal, the office in question shall become vacant. The Supreme Court, in an order for involuntary retirement for disability or an order for removal, may prohibit such person from holding judicial office in the future. The rights of an incumbent so retired to retirement benefits shall be the same as if his retirement had been voluntary. (All emphasis added)

Texas Constitution, Article 15, Section 4, Impeachment, Judgment; indictment, trial and punishment: Judgment in cases of impeachment shall extend only to removal from office, and disqualification from holding any office of honor, trust or profit under this State. A party convicted on impeachment shall also be subject to indictment, trial

and punishment according to law. (Emphasis added)

42 United States Code, Section 1983:

> "Civil action for deprivation of rights; Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

QUESTION PRESENTED

Does a private citizen, who has bribed a state court judge, and those in conpiracy with him, derive immunity from damages under 42 USC Section 1983 from the judge who is held to be immune under the doctrine of judicial immunity?

STATEMENT OF THE CASE

The material allegations are stated in the panel decision of the Fifth Circuit 588 F2d 124, and in the en banc decision reported in 604 F2d 976. Briefly, the complaint alleges that Clinton Manges (hereafter Manges) sole owner of Duval County Ranch Co., Inc., (hereafter DCRC) in a series of transactions bestowed on Judge O. P. Carrillo (hereafter Carrillo) the then Judge of the 229th District Court of Duval, Starr and Jim Hogg Counties, Texas, numerous gifts and favors (App.8-10) in exchange for the Judge's agreement to rule as Manges desired in matters in which he was interested. (App. 10-11) The judge consummated the conspiracy by issuing the wrongful injunction halting for some thirty-one months Respondent SPARK'S production of petroleum products from three wells

located on an 80 acre tract adjoining DCRC's lands. (App.12-13 and 17) The injunction was ultimately dissolved in Winslow v. Duval County Ranch Co., Inc., Tex.Civ.App. 1975, 519 SW2d 217, wherein the Appellate Court at p. 224, reviewed pertinent facts and cast light on the unlawful nature of the injunction:

> "Thus, under broad conclusory allegations of a very general nature applicable to all defendants alike (when the proof showed a lack of concert of similarity of action), the trial court enjoined all defendants in a common order prohibiting them from the further exercise of their lawful right to produce oil. This was done upon a record which did not support the broad order which was entered; upon a record which contained neither pleading nor proof of the lack of an adequate remedy at law, where there was no allegation of insolvency or proof of inability to respond in damages; done without giving any consideration to the doctrine of clean hands, laches, balancing of equities, or a showing that a less drastic injunctive or-

der (i.e. one forbidding further pollution) was not adequate to protect plaintiff's alleged rights.

From the foregoing resume of the case, it is apparent that we are of the opinion that the trial court abused its discretion in enjoining the defendants from production of oil from the leased premises. The decree of the trial court enjoined the defendants from activities which were lawful and within a proper legal exercise of their rights--the production of oil. In granting the injunction, the trial court abused its discretion and violated the rules set out in Villalobos v. Holguin, supra (208 SW2d at 875), and Scoggins v. Cameron County Water Imp. Dist. No. 25, supra (264 SW2d at 173).

As to SPARKS-LYND, the court added:

"Thus, we hold that 'the issuance of the injunction in this case [against Lynd-Sparks] violates this provisions of the law and regardless of the rights of the parties finally to be adjudicated, we hold that the writ was improvidently issued at the time it was, and under the conditions then existing.'"

The district court and panel held that Judge Carrillo was immune, although the un-

lawful injunction was inducted by bribery. The district court and panel then followed Haldane v. Chagnon, 345 F2d 601 (9th Cir.) and its progeny to hold that the state judge, being immune, the required color of state action was missing, and those private persons who bribed the judge or conspired with those who bribed him, derived immunity from the judge.

The en banc decision rejected the Haldane doctrine of derivative immunity under the facts of this case.

ANSWER TO SUMMARY OF ARGUMENT

Petitioner summarized (paragraphs I to XI, p. 6-11) that the doctrine of immunity shields judges, not only from liability in civil cases, but also from ordinary duties of citizenship such as giving testimony of facts within their knowledge relating to conspira-

cies of private parties. We contend that no public purpose is served by such extension, and that such extension would tend to corrupt the judiciary, not preserve its integrity and independence.

It may well have been said (we think as improvident dicta) that a judge is not liable no matter how corrupt his acts. It is a correct maxim that any rule without exceptions, is a bad rule. To immunize a judge who gave up his independence for a bribe, and then to immunize the person who bribed him, all on a theory that this somehow preserves independence of the judicicial mind, is per se, absurd!

No case by Petitioner in support of derivative immunity has accorded such immunity to a private person involved in conspiracy whereby a judge was bribed, where the

judge had been held disqualified thereby, or where the judge had been removed from office for corruption by impeachment. Consequently, such cases do not apply factually, and are factually irrelevant. Most of such cases could have been decided on a more correct ground that no conspiracy was pled or shown.

To argue that the judge is not a "person", and therefore there was no "state action" as contemplated by 42 USC Sec. 1983, is but to building one fiction upon another fiction to arrive at an unjust result not intended by Congress, and not invited by considerations of public policy. Even if we concede for argument that the judge is not a "person", it does not follow that the wrongful injunction he issued as judge of a state court, which injunction Respondents obeyed to their substantial damage for 31 months, was

not "state action" as contemplated by Section 1983.

ARGUMENT IN REPLY

Argument of Petitioner, and where applicable, the amicus curiae arguments of the States of Florida and Texas will be answered as follows:

I. PUBLIC POLICY SUPPORTS THE EN BANC DECISION.

A. Bribery, the Ultimate Judicial Corruption is Here Involved:

In matters involving bribery of any public official, more especially a judge, the expressions of public policy contained in the U. S. Constitution, Article II, Sec. 4, and Texas Constitution, Article V, Sec. 1a, Article XVI, Sec. 41, and Article XV, Section 4 could hardly be made more clear. Public officials guilty of bribery should be im-

peached, removed from office, and barred from again holding public office.

B. Public Policy Is Designed to Preserve Independence of Honorable Judges; Not to Conceal Corruption in the Judiciary:

Petitioner cites Bradley v. Fisher, 80 U.S. (13 Wall) 335, 20 L.Ed. 646 (1872) wherein a judge, threatened with physical violence, held the party making the threat in contempt, and courageously preserved the integrity and independence of his court. This is the exact opposite of the facts in Sparks, where the judge, under the inducement of a bribe, voluntarily surrendered the independence of his judicial mind, and subordinated his judicial will to the corrupt scheme of the briber.

Respondents do not complain of the application of the doctrine of immunity to aid

of judicial independence, but of the extension of the doctrine to immunize those who have corrupted a judge by bribery, destroyed his independence, and thereby denied Respondents a basic constitutional right to trial of their case before an impartial and independent judge.

That part of Justice Field's opinion in Bradley that most nearly expresses the essence of public policy (U.S. p. 356, L. Ed. p. 652) is:

> "No one would pretend that an attempt to control the deliberation of the Bench, by the apprehension of violence, and subject the judges to the power of those who are, or ought to be, subordinate to them, is compatible with professional duty, or the judicial independence so indispensable to the administration of justice. And an enormity of the sort, practised but on a single judge, would be an offense as much against the court, which is bound to protect all its members, as if it had been repeated on the person of each of them, because the

consequences to suitors and the public would be the same)."

That a single judge's independence is compromised truly is "an enormity," and it is no less so if independence is given up voluntarily in exchange for a bribe, because, as the court observed, "the consequences as to the suitors and the public would be the same."

C. Pierson v. Ray did not accord immunity to private parties:

Petitioner next cites Pierson v. Ray 386 U.S. 547, 18 L.Ed.2d 288, 87 St. Ct. 1213 (1967) which held that Section 1 of the Civil Rights Act of 1871 (42 USC Sec. 1983) did not abolish the common law doctrine of immunity of judges for acts within their jurisdiction. Pierson did not immunize private individuals who corrupted a judge. This holding by the majority in Pierson drew strong dissent from Justice Douglas, who urged that Congress did

in fact intend to abolish the doctrine of immunity in Section 1983 cases, and that independence and integrity of the judiciary would not be aided by immunity in civil rights cases. (386 U.S. 558 18 L.Ed. 297) While his dissent did not persuade the majority in Pierson, it applies with great force against extension of the doctrine to immunize those private persons who corrupt and destroy the independence of a single judge.

D. Conflict of Circuits on Derivative Immunity:

Respondents concede that the policy behind the doctrine of judicial immunity is to preserve the independence of the judiciary. It is the fact that Respondents were denied the blessings of an independent judiciary that brings them before this court with

this complaint. Respondents concede further that there is a conflict in the rulings of the circuits on the issue of derivative immunity, as alleged in Petitioner's Brief, Paragraphs VIII and IX, p. 21-23. No case cited by Petitioner involved facts where the private party had bribed a judge, thereby involving the judge in a disqualifying and impeachable offense, (U.S. Constitution, Article II, Sec. 4; Texas Constitution, Article V, Sec. 11, Article XV, Sec. 4, and Article XVI, Sec. 41), and the private parties in the serious crime of bribery and conspiracy. The judge here has been disqualified, impeached, removed as judge, and prohibited from again holding judicial office. (In Re: O. P. Carrillo, District Judge, Tex. S.Ct. 1976, 542 SW2d 105)

The ordeal of impeachment brought on an Amendment to the Texas Constitution empowering the Supreme Court, upon removal of a corrupt judge, to bar him from again holding judicial office, (Texas Constitution, Article V, Sec. 1a) thereby plugging the loophole noted in In Re: Laughlin, S.Ct. 1954, 265 SW2d 805.

Respondents contended in 79-1239, as did Justice Douglas' dissent in Pierson, that the judge himself should not be absolutely immune. We lost that issue, but it does not follow that a judge should be permitted to confer immunity on a litigant by accepting a bribe from him! To allow such would be a mockery of the doctrine's rationale to promote judicial independence.

E. Public Policy and Logic Support the En Banc Decision:

It is not exactly correct to refer to the en banc decision of the court below as "The Minority Rule in the Circuit Courts," as Petitioner does in Paragraph XI. No circuit had been faced, prior to Sparks, with a case involving the ultimate judicial corruption of bribery whereby a judge voluntarily surrendered his independence, thereby destroying the very independence immunity was intended to preserve. While not raising questions as to the correctness of the results of the many cases cited in Petitioner's Paragraph VIII, p. 21-22, Sparks did demonstrate the flaw in reasoning if the idea of derivative immunity were carried to its absurd conclusion of conferring immunity on a private person who bribes a judge, and those who conspire with him.

Certainly, in no case cited by Petitioner in Paragraph VIII, did the private defendants excused perform any act or acts which would have destroyed the independence of the judge. Nor did the judge in any case so cited voluntarily give up his independence and subordinate his will to that of corrupt litigants before him. Nor was the fact of judicial misconduct proved in a disqualification proceeding, as in Sparks, and the judge impeached and removed for a series of corrupt acts. (In Re: Carrillo District Judge, Tex. S.Ct. 1976, 542 SW2d 105) Consequently, the cases relied upon by Petitioner do not apply factually.

The doctrine of judicial immunity is for the benefit of the public through improvement of the administration of justice. No one can appreciate the importance of an independent

judiciary more than a member of the public who has tried his case before a judge who has accepted a bribe from the opposing litigant, as in Sparks. Sparks is here because a private citizen succeeeded by unlawful means in inducing a judge to abandon his independence and abuse his office. It is a paradox that the private individual here claims immunity because he succeeded in inducing a judge to participate in his unlawful scheme. To permit the private persons who conspire to and to corrupt a judge to derive immunity from the judge would constitute an open invitation to criminal and corrupt elements of society to interest themselves in the elective and appointive processes by which judges attain their offices. As the majority observed in Sparks:

> "Sound policy suggests that attempts by such persons to subvert the judiciary should be penalized in every just way, civil as well as criminal. It suggests that the fullest redress that the judicial system can accommodate while functioning effectively should be granted for such odious wrongs. And it suggests that the actual incentive to corruption held out by the present doctrine, with its promise of civil immunity to those who succeed in involving a judge's powers in their nefarious schemes, should be removed."

II. BALANCING OF EVILS FAVORS EN BANC RULING: In answer to Petitioner's Brief, Paragraphs X, and XI, p. 24-32, and Amicus Curiae States of Florida and Texas, Respondents contend:

A. Inconvenience to Judges does not exceed basic requirements of citizenship:

If we are to have and preserve a government of laws, then any erosion of the means of enforcing such laws, or any doctrine that excuses public officials charged with en-

forcing the law and maintaining the integrity of our system or laws is per se suspect. The duty of those with knowledge of facts to give testimony is so basic to our institutions that it can be compelled, not only by the sovereign, but by civil litigants, and even by persons charged with crimes.

The oath of allegiance of the citizen includes the ideal of "liberty and justice for all." Texas lawyers (as is true in all states) are bound by oath to uphold and defend the Constitution and laws of Texas and the United States, to which is added that he will "discharge his duty to his client to the best of his ability." (Art. 309, Tex.Civ. Stats.) The oath of United States Justices and Judges binds them to "administer justice without respect to persons." Surely public policy expressed in so basic provisions as

oaths required of all from private citizens to Justices of the Supreme Court and President, cannot be so tortured as to excuse those charged with its administration from its most basic duty of giving testimony; nor is it tolerable to allow private persons who succeed in involving a judge in bribery to go free of civil liability along with the judge under the doctrine of immunity.

As observed in Sparks (604 F2d 976, at p. 980) the inconvenience to the judge is "comparatively insignificant" considered in connection with the harm which would flow from allowing derivative immunity. The en banc decision does not impose on a judge any inconvenience, but only requires of him his plain duty as a citizen.

B. Public Policy Supporting Immunity for Judges does not apply to Private Parties:

Petitioner quotes from Gregoire v. Biddle, 177 F2d 579 at p. 581 in support of his argument that "balancing the relative harms" supports derivative immunity for petitioner. The trouble here is that in Gregoire the parties acquired immunity by virtue of the public office each held, and no defendant derived immunity from an immune official. So, the case does not support the argument.

1. Petitioners' (and Amicus') Argument is based on two false presumptions: Petitioner would have the court believe that if Respondents prevail, (i) every unsuccessful litigant in a state court case will seek to relitigate his case in federal court under Section 1983; and (ii) that judges would be so harassed and intimidated by discovery procedures and subpoenaed testimony that they

cannot maintain their integrity or independence. Both presumptions are patently false, and totally against all human experience and judicial history. What lawyer, after having tried his client's case on the merits in state court and lost, would feel he could better himself or his client by filing a frivolous complaint in federal court falsely alleging a nonexistent conspiracy between the state judge and the opposing litigant? To ask the question is to answer it. Judicial history is to the contrary. Very few cases are appealed beyond the trial court level. There yet exists a Code of Ethics and Rules of Procedures which would not be ignored with impunity, as Petitioner and Amicus Curiae suggest. There exists also a Code of Judicial Conduct approved by the American Bar Association which counsels judges against

being swayed by partisan demands, public clamor, etc. and especially against ex parte communications. Bribery is a felony in Texas and most states, and is an impeachable offense under the U. S. and Texas Constitutions. Certainly with these restraints it is not realistic to presume that violations would be so pervasive among judges that judges generally would be intimidated by a possibility of being required to tell the truth about their conduct in any case over which they presided.

The fallacy of these presumptions is possibly best illustrated by the quotation from the minority in Sparks, appearing on page 8-10 of the Florida Amicus brief, in reference to the "chilling effect of submission to discovery and the appearance as a witness." We submit that no honorable judge,

who has conducted himself according to the Code of Judicial Conduct, even though he may have made an erroneous ruling, would feel a "chilling effect" from answering honestly any questions propounded to him. However, if he had accepted bribes from a litigant, or had held secret ex parte communications and reached unlawful accords with a litigant, then his dilemma of whether to (1) take the fifth; (2) tell the truth and expose himself; or (3) to add perjury to his offense and hope not to be caught, would indeed be chilling. It should be!

The final sentence of the quotation from the minority in Sparks, (Florida brief, p. 10) is no less revealing:

> "Finally, if a judge condones a particular course of conduct, it seems manifestly unfair that the judicial expert should be immunized from attack but that the untutored lay person should be vulnerable to

> costly attack for participating in the same activity as the judge."

Just what is the contention here? Are they saying that if a judge will accept a bribe, the layman should be free to give it, and both should be immune? Of all the horrors speculated about by Petitioner, Amicus and the minority in Sparks, none could be more devastating to the independence of the judiciary than this.

2. Answer to Florida's Contention re: Guardians ad litem, etc.: Respondent's position is that denial of derivative immunity for private persons who bribed a judge, and those who conspired with such private persons, will not result in denial of immunity to such parties as guardians ad litem. Such persons are accorded absolute or limited immunity because they are officers of the court. A private litigant does not have

legal status as an officer of the court or as a public official. We contend that officers of the court and other public officials are not affected by the en banc decision denying immunity to private parties.

III. REMEDIES AVAILABLE IN TEXAS.

The invitation, contained in Petitioner's brief p. 28, that we pursue remedies against petitioner in state courts has the ring of Brer Rabbit's preference for the briar patch. Carrillo was sitting as judge of the state court when this suit was filed. After Carrillo's removal, the new elected judge declines to try cases involving Manges, for obvious reasons. The difficulties and uncertainties of securing visiting judges under existing procedures are sufficient obstacle alone to make a federal forum preferable. A case involving denials of consti-

tutional rights belongs in federal court. Respondents, who as plaintiffs below, have the option to select the forum, have selected a federal forum for valid reasons, which are discussed in "REPLY OF RESPONDENTS TO PETITION OF ORVILLE E. DENNIS FOR WRIT OF CERTIORARI", page 16-27, which arguments are here adopted.

Some observations concerning obstacles faced by Respondents in pursuing the state court option may be helpful. The loophole displayed in Laughlin in 1954, which allowed a state judge, removed by the Supreme Court for corruption, to run for and again hold judicial office, was not closed until the Constitutional Amendment passed in November 1977 in response to the Carrillo impeachment. Although thefts from political subdivisions were clearly established in Parr v. U.S., 5th

Cir. 1959, 265 F.2d 894, and S.Ct. 1960, 363 U.S. 370, 4 L.Ed.2d 1277, 80 S.Ct. 1171, the State of Texas made no effort through the local District Attorney or Attorney General to recover the stolen funds from the defendants, one of whom was, incidentally, O. P. Carrillo. Although it was proved in disqualification proceedings in a civil case that Manges had given and Carillo had accepted bribes, and bribery is a felony under Article 36.02 of the Texas Penal Code, neither the District Attorney nor the Attorney General have caused prosectuion to be brought against Manges.

Respondents have no apology for declining Petitioners' invitation to fight it out in the Duval County briar patch.

IV. CONCLUSION

The en banc decision of the Fifth Circuit majority denying derivative immunity to petitioner is supported by sound considerations of public policy, and should be affirmed. The public policy considerations of supporting independence of the judiciary are not served by extending immunity to private persons who bribed a state judge or conspired with one who did. Any inconvenience suffered by judges who might be called as witnesses is outweighed by the public policy undergirding this nation's ideals of a government of laws with equal justice to all. As observed by the majority in Sparks, "that the actual incentive to corruption" held out by the present doctrine (of derivative immunity) with its promise of civil immunity to those who succeed in involving a judge's powers in

their nefarious schemes, should be removed.

(Emphasis added)

Respectfully submitted,

SIDNEY SPARKS and R. L. LYND, d/b/a SIDNEY SPARKS, TRUSTEE,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Reply Brief of Respondents have been deposited with the United States Postal Service, with proper first-class postage affixed thereto, certified mail, return receipt requested, addressed to counsel of record for Petitioner, Mr. Finley L. Edmonds, P. O. Box 2624, 1515 Bank & Trust Tower, Corpus Christi, Texas 78403; to attorneys for Amicus Curiae, Hon. Mark White, Attorney General of Texas, P. O. Box 12548, Capitol Station, Austin, Texas, 78711, and Hon. Jim Smith, Attorney General of Florida, The Capitol, Tallahassee, Florida, 32301, on this 21st day of May, 1980.

Garland F. Smith

GARLAND F. SMITH